

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ANTOINE DANIEL PIERRE, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 07-4306  
 )  
 BROWARD COUNTY SCHOOL BOARD, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 27, 2008, in Fort Lauderdale, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Antoine Daniel Pierre, pro se  
5688-25th Street Circle East  
Bradenton, Florida 34203

For Respondent: Michael T. Burke, Esquire  
Johnson, Anselmo, Murdoch, Burke,  
Piper & Hochman, P.A.  
2455 East Sunrise Boulevard, Suite 1000  
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent discriminated against Petitioner on the basis of national origin, race, and perceived disability in violation of the Florida Civil Rights Act of 1992, as amended.

PRELIMINARY STATEMENT

Antoine Daniel Pierre filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) against the Broward County School Board (School Board) alleging that the School Board discriminated against him on the basis of national origin (Haitian), race, and perceived mental disability. On August 21, 2007, the FCHR issued a Determination of No Cause and a Notice of Determination of No Cause. Mr. Pierre timely filed a Petition for Relief with the FCHR against the School Board. On September 19, 2007, the FCHR referred this matter to the Division of Administrative Hearings.

At hearing, to assist Mr. Pierre in communicating, a Creole interpreter was provided. Mr. Pierre testified on his own behalf and entered five exhibits (Petitioner's Exhibits numbered 1 through 5) into evidence. The School Board presented the testimony of four witnesses and entered 14 exhibits (Respondent's Exhibits numbered 1 through 14) into evidence.

The School Board ordered a transcript of the hearing. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of two volumes, was filed on March 18, 2008. The parties timely filed their post-hearing submissions,<sup>1</sup> which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. No dispute exists that Mr. Pierre is a male and Black and that his national origin is Haitian. No dispute exists that he is a member of the protected class as it relates to discrimination.

2. No dispute exists that, at all times material hereto, the School Board was an employer as defined by the Florida Civil Rights Act of 1992, as amended.

3. Mr. Pierre began his employment with the School Board in 1996. For nine (9) years, he worked in the Maintenance Department and was promoted three times. His various supervisors rated his work as excellent.

4. At all times material hereto, Mr. Pierre's co-workers were of various ethnic groups—Haitian, Hispanic, Black/African American, Caucasian, etc.

5. For approximately seven years, Mr. Pierre was under the supervision of Foreman John Bateman. Mr. Bateman considered Mr. Pierre to be a "fabulous" worker and recommended Mr. Pierre for promotion. Subsequent thereto, Mr. Bateman observed a change in Mr. Pierre's behavior and attitude.

6. Mr. Bateman discussed the changes in Mr. Pierre's behavior and attitude with his (Mr. Bateman's) supervisor, James Bass.

7. Such a change in behavior and attitude was exhibited on April 27, 2004. On that date, Mr. Pierre refused to take orders from a temporary leadman, Joe Williams, in the absence of the leadman, Joe Pierrot. Mr. Bass was called to the work-site, and he spoke to Mr. Pierre regarding his refusal to follow the directives of Mr. Williams. After the discussion, Mr. Pierre agreed to follow the directives of Mr. Williams. Mr. Bass memorialized the incident in a memorandum "For the Record" dated the same day. Mr. Bass testified as to the incident and noted, among other things, in the memorandum that Mr. Pierre had become "very disruptive, creating a hostile environment;" that, after the discussion, Mr. Pierre "returned to his duties without incident;" and that Mr. Pierre was "a very hard worker, but he appears to have 'fits' at times . . . seems to intimidate his co-workers with his attitude and overly-aggressive behavior . . . has a tendency to accuse his co-workers of not liking him because of his nationality (Haitian)." Mr. Pierre testified that he did not look at the memorandum and refused to sign it; and that he informed Mr. Bass that he (Mr. Pierre) did not have a "fight" with anyone.

8. Another incident occurred on July 9, 2004. Mr. Bass memorialized the incident in a memorandum "For the Record" dated the same day of the incident. A worker, Mike Walters, had placed a bottle of water in a refrigerator over night, and the

next day, the bottle of water was missing. As Mr. Pierre was walking past Mr. Walters, he (Mr. Walters) commented that someone had taken his bottle of water. Mr. Pierre immediately took offense, became agitated, and refused to calm down, even after Mr. Walters explained to Mr. Pierre that he was making a general statement, not directed at Mr. Pierre. Only after the leadman, Mr. Pierrot, interceded did Mr. Pierre calm down. Mr. Bass included in the memorandum that Mr. Pierre appeared to believe that "everyone was out to get him"; that Mr. Pierre's co-workers expressed being fearful of him; that Mr. Pierre was advised that such behavior was not acceptable; and that further such behavior would lead to disciplinary action up to and including termination. Mr. Bass signed the memorandum, but Mr. Pierre refused to sign it.

9. Mr. Pierre testified at hearing that the Mr. Walters accused him of "stealing" the water but that he knew nothing about it. The undersigned finds Mr. Pierre's testimony credible that he (Mr. Pierre) believed that he was being accused of stealing the water but that he knew nothing about the water being stolen. An inference is drawn and a finding of fact is made that Mr. Pierre became upset because of this belief.

10. Mr. Pierre was counseled regarding his behavior. Mr. Bass and the District Maintenance Manager, Mark Dorsett, decided that a re-assignment might benefit Mr. Pierre and his

co-workers. As a result, on July 20, 2004, Mr. Pierre was re-assigned from a team of workers, i.e., a crew, responsible for cleaning air conditioning coils to a crew responsible for preventative maintenance tasks. The re-assignment was memorialized in a memorandum dated July 20, 2004. The memorandum provided, among other things, that Mr. Pierre would be monitored for six months and, if the re-assignment did not improve Mr. Pierre's relationship with his co-workers, "progressive disciplinary action" would be invoked; and that the re-assignment would hopefully improve the relationships. The memorandum was copied to Mr. Pierre.

11. Approximately three months later, however, on October 20, 2004, another incident occurred. The incident was memorialized in a memorandum "For the Record" dated October 25, 2004. According to the memorandum, Mr. Pierre had an argument with Sammie Riviera, Mr. Pierre's work-partner, regarding Mr. Pierre's tools, which "escalated to a verbal altercation." Also, the memorandum indicated that, when Mr. Pierre returned to work, after the incident, he began accusing his co-workers of taking his missing tools, which he was unable to locate. Further, the memorandum indicated that the foreman, Jose Martell, advised Mr. Pierre that his behavior would have to "cease immediately." Moreover, the memorandum indicated that Mr. Martell and Mr. Martell's supervisor, Diane Caulfield,

determined that Mr. Pierre would benefit from the School Board's Employees Assistance Program (EAP). Mr. Martell and Ms. Caulfield signed the memorandum, but Mr. Pierre did not.

12. Mr. Riviera did not testify at hearing. Mr. Pierre testified that, contrary to what others thought that he believed, he did not believe that Mr. Riviera stole his tools. Mr. Pierre testified that Mr. Riviera used his tools and dropped them on the floor; that he (Mr. Pierre) picked-up the tools and placed them in the truck; that Mr. Riviera attempted to talk to him (Mr. Pierre) but that he (Mr. Pierre) refused to talk to Mr. Riviera. In his testimony, Mr. Pierre did not deny that he and Mr. Riviera argued.

13. On October 26, 2004, Ms. Caulfield presented Mr. Pierre with an EAP Referral Form, which stated the reason for the referral as "Anger Management - no one wanting to work with him." Ms. Caulfield signed the EAP Referral Form, but Mr. Pierre refused to sign it.

14. At hearing, Mr. Pierre testified that he did not recall Ms. Caulfield's request for him to attend the EAP. The undersigned finds Mr. Pierre's testimony to be credible, but such finding does not change or affect the undersigned's finding that Ms. Caulfield requested Mr. Pierre to attend the EAP.

15. Approximately 20 days later, on November 15, 2004, another incident occurred. The incident was memorialized in a

memorandum "For the Record" dated November 16, 2004.

Mr. Pierre's work-partner, Mr. Riviera, observed Mr. Pierre handling a device that he (Mr. Pierre) should not have been handling, and Mr. Riviera so advised Mr. Pierre, who became "very agitated" and was "yelling" at Mr. Riviera. Additionally, the memorandum indicated that Mr. Riviera had observed, on occasion, Mr. Pierre mumbling to himself "excessively" and "banging himself against a wall." Further, Mr. Riviera indicated that such behavior by Mr. Pierre, together with Mr. Pierre's exhibited temper, caused Mr. Riviera to be "fearful of his personal well-being" while working with Mr. Pierre. Mr. Martell signed the memorandum, but Mr. Pierre did not sign it.

16. Approximately, nine months later, in August 2005, Mr. Pierre visited the Director of Maintenance, Sylvester Davis. Mr. Davis had known Mr. Pierre since Mr. Pierre began working with the School Board and had always encouraged Mr. Pierre to visit him. Mr. Davis observed that Mr. Pierre was upset about something, but Mr. Pierre was unable to explain to Mr. Davis what was happening to him (Mr. Pierre), so Mr. Davis decided to talk to Ms. Caulfield. Mr. Pierre testified that he went to talk to Mr. Davis because he (Mr. Pierre) was not feeling safe at work, believed that he (Mr. Pierre) was being "persecuted," and believed that Mr. Davis could help.



17. Mr. Davis met with Ms. Caulfield and expressed his concern regarding Mr. Pierre. She explained what had been happening with Mr. Pierre and showed Mr. Davis the memoranda that had accumulated regarding Mr. Pierre's behavior. Mr. Davis suggested the EAP, and Ms. Caulfield advised him that Mr. Pierre had already been referred to the EAP.

18. After his meeting with Ms. Caulfield, Mr. Davis became concerned regarding the safety of Mr. Pierre and the other workers. Mr. Davis determined that a Fit-For-Duty examination was appropriate.

19. In a memorandum dated September 19, 2005, directed to the School Board's Special Investigative Unit (SIU), which is within the School Board's Office of Professional Standards (OPS), Mr. Davis, among other things, provided the SIU with information in order for it to conduct a Fit-For-Duty examination of Mr. Pierre. In the memorandum, Mr. Davis indicated, among other things, that Mr. Pierre's behavior had gotten progressively worse; that a safety problem had arisen since Mr. Pierre's work assignments required assistance, but his co-workers were refusing to work with him because of their fear of his reactions; that Mr. Pierre's co-workers were concerned about him, had respect for him, and viewed him as an excellent worker; and that Mr. Pierre's co-workers just wanted him to get help. Further, in the memorandum, Mr. Davis requested that a

person who could speak Creole be present when the SIU spoke with Mr. Pierre.

20. Moreover, at hearing, Mr. Davis testified that, at no time did he want Mr. Pierre to be terminated, only for him to get the help that he needed to continue to work for the School Board. Mr. Davis viewed the Fit-For-Duty examination as a way to help Mr. Pierre. Mr. Davis' testimony is found to be credible.

21. The Fit-For-Duty evaluation is a non-disciplinary process wherein the School Board is attempting to help an employee.

22. School Board Policy 4004 provides in pertinent part:

**RULES**

**Fit for Duty Determination Procedures**

(emphasis in original)

1. The Executive Director of Professional Standards & Special Investigative Unit (SIU) receives request from a Principal/Administrator (includes District Administrators) or Superintendent/Designee. (Supporting Documents)

2. SIU notifies employee via certified mail that he/she must undergo a physical and/or psychological examination. A reassignment letter is prepared directing employee to remain at home with pay, pending the outcome of the examination. (Letter 1)

3. The affected employee shall select the name of a medical doctor, psychologist or psychiatrist from a list maintained by the Executive Director of Professional Standards

& Special Investigative Unit, within 48 hours. (See Attachment to Letter 1)

4. SIU Administrator schedules within ten working days a medical appointment and follows-up in writing to the doctor's office and to the employee of appointment confirmation. **Note: This is a mandatory appointment and failure to attend can result in termination of employment for failure to comply with School Board Policy 4004.**

(Letters 2 & 3)  
(emphasis in original)

\* \* \*

6. The doctor as delineated in the policy will conduct Pre-evaluation at District expense. **Note: a 2<sup>nd</sup> Opinion will be at the employees expense if requested, with the employee selecting from the School Board approved list as delineated in the policy.**

(emphasis in original)

\* \* \*

18. If employee fails to attend any mandatory appointment with the assigned doctor of the designee assigned to handle the Fitness for Duty Evaluation Case per School Board Policy 4004, then a pre-disciplinary meeting is arranged and employee is notified in writing. (Letter 7)

19. If applicable a recommendation for termination is sent to the School Board of Broward County based on just cause, for insubordination, failure to comply with School Board Policy 4004. (Letter 8)

23. By letter dated September 27, 2005, which was hand-delivered to Mr. Pierre, the Executive Director of OPS, SIU, Joe Melita, notified Mr. Pierre that Mr. Davis had requested a Fit-For-Duty Assessment, pursuant to School Board Policy 4004, and

that Mr. Pierre was required to submit to a psychological examination at School Board expense. Mr. Melita provided further in the letter that Mr. Pierre was directed to choose a doctor from a list of doctors, which was attached to the letter, indicating his (Mr. Pierre's) first and second choice, within two days of receipt of the letter; that the OPS Administrator, Richard Mijon, would schedule the appointment with the physician chosen; and that Mr. Pierre was to not return to work, but remain at home with pay pending the determination of the examination. The letter was addressed to Mr. Pierre at 2450 SW 7th Street, Fort Lauderdale, Florida 33312.

24. An inference is drawn and a finding of fact is made that a perception existed that Mr. Pierre may have been experiencing psychological problems.

25. Additionally, on September 27, 2005, Mr. Mijon met with Mr. Pierre and two of Mr. Pierre's line supervisors in Mr. Mijon's office. The line supervisors requested that a Creole-speaking individual also attend to assist Mr. Pierre in communicating only. Mr. Mijon complied with the request and obtained the services of one of his officers, Marc Elias, who was born in Haiti and who spoke Creole, for interpretation purposes only. The aforementioned letter dated September 27, 2005, was hand-delivered to Mr. Pierre at this meeting, and Mr. Mijon reviewed the contents of the letter with Mr. Pierre,

who signed the letter and dated his signature (September 27, 2005).

26. The list of physicians attached to the letter included physicians from the counties of Dade [sic], Broward, and Palm Beach. Mr. Pierre testified at hearing that he did not know any of the doctors on the list and, therefore, Mr. Elias circled three of the doctors and marked the order of preference (first, second, and third) for him. Mr. Pierre's testimony is found to be credible, but also an inference is drawn and a finding is made that the choices were made after consulting with Mr. Pierre. Additionally, on the list, Mr. Pierre provided his contact telephone numbers (home and cell). Mr. Mijon reviewed with Mr. Pierre the choice of doctors, with preferences, and his (Mr. Pierre's) telephone numbers.

27. Also, Mr. Pierre's address on the letter dated September 27, 2005, was taken from the School Board's records. At the meeting, Mr. Pierre did not indicate that his mailing address was incorrect.

28. At the conclusion of the meeting, Mr. Pierre requested that a Creole-speaking doctor perform the Fit-For-Duty examination. Mr. Mijon considered Mr. Pierre's request reasonable, knew that none of the physicians on list spoke Creole, and indicated to Mr. Pierre that he would hold the list

of physicians in abeyance and locate a Creole-speaking doctor through the EAP.

29. On or about October 3, 2005, Mr. Mijon received a list of Creole-speaking psychiatrists and/or psychologists from the EAP. On that same day, Mr. Mijon again obtained the services of Mr. Elias and directed Mr. Elias to contact Mr. Pierre by telephone. Mr. Elias complied and contacted Mr. Pierre by telephone, activating the speakerphone. Mr. Elias participation in the entire telephone conversation was for translation purposes only. Mr. Mijon informed Mr. Pierre that a list of Creole-speaking doctors had been obtained and that Mr. Pierre needed to come to Mr. Mijon's office on October 5, 2005, to do as he had done previously—choose three doctors, identifying his preferences (one through three), and sign and date the document. Mr. Pierre indicated, during the telephone conversation, that he would not come into Mr. Mijon's office to do anything, indicating, among other things, that he (Mr. Pierre) was being persecuted. Mr. Mijon informed Mr. Pierre that, if he did not come into his (Mr. Mijon's) office on October 5, 2005, that he (Mr. Pierre) would be considered to have waived his right to choose from the second list of doctors, and that he (Mr. Mijon) would have no choice but to use the original list chosen by Mr. Pierre, which contained no Creole-speaking doctors, contact

Mr. Pierre's first choice, and schedule an appointment with the first doctor from the original list.

30. On October 5, 2005, Mr. Pierre failed to appear at Mr. Mijon's office. Mr. Mijon proceeded to schedule an appointment with the doctor from the original list, Laura Hohnecker, Ph.D., who was indicated as Mr. Pierre's first choice. The appointment was set for October 12, 2005, at Dr. Hohnecker's office, 1:00 p.m. to 4:30 p.m.

31. On October 6, 2005, Mr. Mijon contacted Mr. Pierre by telephone and again obtained the services of Mr. Elias for translation purposes only. Again, the telephone was placed on speakerphone. Mr. Mijon advised Mr. Pierre that an appointment had been scheduled with Dr. Hohnecker, Mr. Pierre's first choice from the original list, for the Fit-For-Duty examination, and provided Mr. Pierre with the date, time, address, and telephone number of Dr. Hohnecker. Further, Mr. Mijon informed Mr. Pierre that the appointment was mandatory and that, if he (Mr. Pierre) failed to attend the appointment, disciplinary action may result.

32. In addition to the telephone conversation, Mr. Mijon sent a letter, dated October 6, 2005, by certified and regular U.S. mail to Mr. Pierre, containing the same information that was discussed during the telephone conversation. The letter was addressed to Mr. Pierre at the same address that was used by

Mr. Mijon on the letter dated September 27, 2005. The certified letter was returned but not for being unclaimed.

33. Mr. Pierre failed to appear at Dr. Hohnecker's office on October 12, 2005, for his appointment for a Fit-For-Duty examination.

34. Due to Mr. Pierre's failure to appear for his appointment, by letter dated October 14, 2005, Mr. Melita directed Mr. Pierre to appear at his (Mr. Melita's) office on Tuesday, October 25, 2005, at 9:00 a.m. to meet with Mr. Mijon for a pre-disciplinary meeting, indicating that the purpose of the pre-disciplinary meeting was Mr. Pierre's insubordination/noncompliance with School Board Policy 4004. The letter further indicated, among other things, that Mr. Pierre had failed to attend the mandatory appointment, as directed, with Dr. Hohnecker for his Fit-For-Duty examination. Moreover, the letter advised Mr. Pierre that his failure to attend the meeting on October 25, 2005, would result in his (Mr. Pierre's) name being forwarded to the School Board for "termination" of employment. The letter was addressed to Mr. Pierre at the same address that was used by Mr. Mijon on the letter dated September 27, 2005, and was sent to Mr. Pierre by certified and regular U.S. mail. The certified letter was returned but not for being unclaimed.



35. Subsequently, by letter dated November 7, 2005, Mr. Melita informed Mr. Pierre that, due to a hurricane, the meeting scheduled for October 25, 2005 was re-scheduled for Monday, November 14, 2005, at 9:00 a.m., restating the purpose for the meeting and the same information contained in the letter dated October 14, 2005. The letter was sent to Mr. Pierre by certified and regular U.S. mail, at the same address that was used by Mr. Mijon on the letter dated September 27, 2005.

36. Mr. Pierre, accompanied by his counsel, attended the meeting on November 14, 2005. Mr. Elias was also present at the meeting for interpretation purposes only. At the meeting, Mr. Pierre denied that he had received a telephone call on October 3, 2005, regarding Mr. Mijon obtaining a list of Creole-speaking doctors for the Fit-For-Duty evaluation and the consequences for him (Mr. Pierre) not attending the meeting scheduled for October 5, 2005, with Mr. Mijon.

37. At hearing, Mr. Pierre also testified that he did not receive the telephone call on October 3, 2005, regarding the meeting on October 5, 2005, and the consequences for his failure to attend. The undersigned does not find Mr. Pierre's testimony to be credible.

38. The undersigned makes a finding of fact that Mr. Pierre received the telephone call on October 3, 2005,

regarding the meeting on October 25, 2005, and the consequences for his failure to attend.

39. Also, at hearing, Mr. Pierre testified that he did not speak on the telephone with Mr. Mijon and Mr. Elias on October 6, 2005, regarding the appointment with Dr. Hohnecker on October 12, 2005, and the consequences for his failure to attend. The undersigned does not find Mr. Pierre's testimony to be credible.

40. A finding of fact is made that Mr. Pierre received the aforementioned telephone call on October 6, 2005, regarding the appointment with Dr. Hohnecker on October 12, 2005, and the consequences for his failure to attend.

41. At the meeting on November 14, 2005, Mr. Melita determined that Mr. Pierre had presented no justifiable explanation for his (Mr. Pierre's) failure to attend the appointment with Dr. Hohnecker on October 12, 2005, for the Fit-For-Duty examination. Mr. Melita recommended termination of Mr. Pierre's employment with the School Board due to insubordination and non-compliance with School Board Policy 4004. By letter dated November 30, 2005, sent by certified and regular U.S. mail, Mr. Melita notified Mr. Pierre, among other things, of the recommendation, the basis for the recommendation, and the date (December 13, 2005) that the recommendation would be submitted to the School Board for approval. Mr. Pierre

testified that he did not receive the letter dated November 30, 2005.

42. Regarding Mr. Pierre's address on the letters from the School Board sent by certified and regular U.S. mail, at hearing, Mr. Pierre testified that, in 2004, he had moved from the address reflected on the letters; that, after he was sent home in September 2005, he was receiving his paychecks from the School Board in the mail at his new 2004 address; and that, around December 2005, he moved to Sarasota, Florida. The evidence demonstrates that the certified letters were returned but fails to demonstrate whether the letters sent by regular U.S. mail were returned or not returned. Furthermore, the evidence demonstrates and Mr. Pierre admits that he and his counsel attended the re-scheduled pre-disciplinary meeting on November 14, 2005, regarding Mr. Pierre's insubordination/noncompliance with School Board policy 4004, as to Mr. Pierre's failure to attend the mandatory appointment with Dr. Hohnecker for his Fit-For-Duty examination. Mr. Pierre testified that he and his counsel became aware of the meeting on November 14, 2005, as a result of his counsel contacting Mr. Melita, attempting to discover what issue the School Board had with Mr. Pierre.

43. The undersigned finds Mr. Pierre's testimony credible regarding his addresses for 2004 and 2005. However, the

undersigned further finds that the failure of Mr. Pierre to advise Mr. Mijon of his (Mr. Pierre's) correct address at the meeting on September 27, 2005 was unreasonable.

44. Mr. Pierre has not been employed since his termination from the School Board.

45. Mr. Pierre has been consistently seeking employment since his termination from the School Board.

46. At the time of the hearing, Mr. Pierre was suffering from hypertension and depression for which is taking medication for both. The evidence fails to demonstrate that Mr. Pierre was suffering from these illnesses or taking medication for them at the time that he was employed with the School Board.

47. The evidence fails to demonstrate that similarly situated employees of the School Board were treated differently or more favorably.

#### CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to Sections 760.11 and 120.569, Florida Statutes (2008), and Subsection 120.57(1), Florida Statutes (2008).

49. Section 760.10, Florida Statutes, provides in pertinent part:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

50. The issue of whether the School Board discriminated against Mr. Pierre in violation of the Florida Civil Rights Act of 1992, as amended, is the only issue before the undersigned. The issue as to whether the School Board terminated him for non-discriminatory reasons, such as the School Board failing to follow its own rules and policies in the termination process, is not before the undersigned unless such failure was done discriminatorily. The evidence fails to demonstrate that the School Board failed to follow its rules and policies in Mr. Pierre's termination for discriminatory purposes.

51. A three-step burden and order of presentation of proof have been established for unlawful employment practices.

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct.

1817, 36 L. Ed. 2d 688 (1973); Aramburu v. The Boeing Company, 112 F.3d 1398, 1403 (10th Cir. 1997). The initial burden is upon Mr. Pierre to establish a prima facie case of discrimination. McDonnell Douglas, at 802; Aramburu, at 1403. Mr. Pierre establishes a prima facie case of discrimination by showing: (1) that he belongs to a protected group; (2) that he was subjected to an adverse employment action; and (3) that his employer treated similarly situated employees outside the protected group differently or more favorably. McDonnell Douglas, supra; Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997); Aramburu, supra. See Kendrick v. Penske Transportation Services, 220 F.3d 1220 (10th Cir. 2000) (similarly situated employees need not be outside the protected group).

52. Once Mr. Pierre establishes a prima facie case, a presumption of unlawful discrimination is created. McDonnell Douglas, at 802; Aramburu, at 1403. The burden shifts then to the School Board to show a legitimate, nondiscriminatory reason for its action. McDonnell Douglas, at 802; Aramburu, at 1403. If the School Board carries this burden, Mr. Pierre must then prove by a preponderance of the evidence that the reason offered by the School Board is not its true reason, but only a pretext for discrimination. McDonnell Douglas, at 804; Aramburu, at 1403.

53. However, at all times, the ultimate burden of persuasion that the School Board intentionally discriminated against him remains with Mr. Pierre. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

54. Applying the prima facie standards, the evidence demonstrates that Mr. Pierre has satisfied the first two prongs but failed to satisfy the third prong of the test. Mr. Pierre has demonstrated that he belongs to a protected class (race, color, sex, religion, national origin, age, and marital status) and that he was subjected to an adverse employment action (termination of employment). However, he failed to demonstrate that the School Board treated similarly situated employees, whether inside or outside the protected group, differently or more favorably. Anderson v. WBMG-42, 253 F.3d 561, 565 (11th Cir. 2001); McGuinness v. Lincoln Hall, 263 F.3d 49, 53, 54 (2d Cir. 2001); Kendrick, supra; Holifield, supra at 1562; Shumway v. United Parcel Service, Inc., 118 F.3d 60, 64 (2d Cir. 1997).

55. Assuming Mr. Pierre had established a prima facie case, the School Board has demonstrated a legitimate, nondiscriminatory reason for its employment action of terminating him. The School Board demonstrated that he failed to attend a mandatory appointment for a Fit-For-Duty

assessment/examination, thereby, committing insubordination; a valid reason for termination according to School Board Policy 4004.

56. Further, Mr. Pierre failed to demonstrate that the School Board's reason for terminating him was not the true reason, but a pretext for discrimination.

Handicap/Disability

57. Mr. Pierre also asserts that the School Board discriminated against him on the basis of a perceived disability. The School Board asserts that it took the action of termination for a reason other than Mr. Pierre's alleged handicap/disability even though the School Board was in the process of determining whether Mr. Pierre was suffering from a mental disability through the Fit-For-Duty assessment. A panel of the FCHR has decided that, in a situation as this, in which a Respondent is alleging that it took its complained of adverse employment action for reasons other than a Petitioner's alleged handicap/disability

[T]o establish a prima facie case of handicap discrimination the Petitioner [Mr. Pierre] must show: (1) [that he] is handicapped; (2) that [he] performed or is able to perform [his] assigned duties satisfactorily; and (3) that despite [his] satisfactory performance, [he] was terminated. Swenson-Davis v. Orlando Partners, Inc., 16 F.A.L.R. 792, at 798 (FCHR 1993). If this burden is sustained, the Respondent [School Board] must



articulate some legitimate nondiscriminatory reason for its action. Hart v. Double Envelope Corporation, 15 F.A.L.R. 1664, at 1673 (FCHR 1992). Once this is articulated, the burden returns to the Petitioner [Mr. Pierre] to demonstrate the Respondent [School Board] intentionally discriminated against the Petitioner [Mr. Pierre]. See St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993).

O'Neill v. Sarasota County School Board, 18 F.A.L.R. 1129, at 1130 (FCHR 1994). The American with Disabilities Act (ADA) defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." Curruthers v. BSA Advertising, 357 F.3d 1213, 1215 (11th Cir. 2004) (citation omitted).

58. M. Pierre is "regarded as . . . 'disabled' if [his] employer perceives [him] as having an ADA-qualifying disability, even if there is no factual basis for that perception. [citation omitted]. As with actual impairments, however, the perceived impairment must be one that, if real, would limit substantially a major life activity of the individual." Id. at 1216 (citations omitted).

59. A person is also "regarded as" being disabled by meeting one of three conditions: "(1) has a physical impairment that does not substantially limit major life activities but is

treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; or (3) has no physical or mental impairment but is treated by an employer as having such an impairment." Rossbach v. City of Miami, 371 F.3d 1354, 1359, 1360 (11th Cir. 2004) (citation omitted). In order to prevail under this theory, the person "must show two things: (1) that the perceived disability involves a major life activity; and (2) that the perceived disability is 'substantially limiting' and significant." Id. at 1360 (citation omitted).

60. Mr. Pierre failed to demonstrate a prima facie case of discrimination under the ADA. The evidence was insufficient to demonstrate that he suffered from an ADA disability. Furthermore, he failed to demonstrate that the perceived disability (mental impairment) involved a major life activity and that the perceived disability was substantially limiting and significant.

61. Furthermore, as previously indicated, Mr. Pierre failed to demonstrate that that the School Board's reason for terminating him was not the true reason, but a pretext for discrimination.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the discrimination complaint of Antoine Daniel Pierre against the Broward County School Board.

DONE AND ENTERED this 31st day of July, 2008, in Tallahassee, Leon County, Florida.

*Errol H. Powell*

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ERROL H. POWELL  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of July, 2008.

ENDNOTE

<sup>1/</sup> The School Board filed a Second Amended Proposed Recommended Order.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.